

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

THE GREATER HARTFORD ASSOCIATION FOR
RETARDED CITIZENS, INC. D/B/A HARC¹

Employer

and

NEW ENGLAND HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199, SEIU

Petitioner

Case No. 34-RC-2157

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find that: the hearing officer's rulings are free from prejudicial error and are affirmed; the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction; the labor organization involved claims to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

The Employer, a Connecticut corporation with its principal office in Hartford, Connecticut, provides residential and vocational support services to individuals with mental retardation (herein called "clients"). The Petitioner seeks to represent a unit of approximately 190 residential and vocational employees at the Employer's Greater Hartford facilities, including all full-time and regular part-time resident support assistants (herein called RSAs), RSA floaters, job coaches, job coach floaters, personal care assistants, and drivers. Although otherwise in accord as to the scope and composition

¹ The Employer's name appears as corrected at the hearing.

of the unit, the Employer, contrary to the Petitioner, would exclude approximately 28 substitute RSAs and substitute job coaches as lacking a sufficient community of interest with employees in the petitioned-for unit. The Petitioner has indicated that it would proceed to an election in any unit found appropriate. There is no history of collective bargaining regarding any of the petitioned-for employees.

Primarily responsible for the Employer's overall operation is President and Chief Executive Officer Dr. Stephen Becker. Reporting directly to Becker are Vice President of Operations Stan Ingersall; Vice President of Residence Support Kathleen Chatlas; Vice President of Programs and Services Joyce Peters, and three other individuals. Reporting to Chatlas are two assistant Directors, who in turn supervise nine Coordinators and seven assistant Coordinators in the residential program. Reporting to Peters are three Directors, who in turn supervise nine Coordinators and seven assistant Coordinators in the vocational program.²

I. FACTS

A. The Residential Program

The Employer operates the following nine residential programs in which it provides client care: 1) seven separate single-family or group home programs located throughout the Greater Hartford area; 2) one program consisting of three condominiums located in Rocky Hill; and 3) the "Supported Living Arrangement" (SLA) program that provides assistance to clients who live in their privately-owned residences. Approximately five clients live in each of the group homes and approximately two clients live in each of the three condominiums. The Employer assigns one Coordinator to each of these programs who, along with an Assistant Coordinator, are responsible for the overall operation of the home or program to which they are assigned, including the supervision of all employees therein.

The Employer employs between 60 and 70 full and part-time RSAs, including RSA floaters. Depending upon client needs, the Employer assigns between two and five RSAs to each of its residential programs. Regularly scheduled RSAs, with the exception of RSA floaters, are assigned to only one of the Employer's nine residential

² The parties stipulated that Directors, Assistant Directors, Coordinators, and Assistant Coordinators are supervisors within the meaning of Section 2(11) of the Act and should therefore be excluded from the Unit.

programs. Most RSAs work from about 2 p.m. or 3 p.m. to 10 p.m. or 11 p.m., including weekend shifts, at a time when the client is at home. A smaller number of RSAs work overnight shifts from about 11 p.m. to about 8 a.m. RSAs may also work between 9 a.m. and 2 p.m. if the client needs to attend to a doctor's visit or stays home for some other reason.

The job duties of an RSA generally include assisting clients with the following: 1) creating a supportive learning environment that encourages the clients to experience success integrating to the social, emotional and physical situations of daily living; 2) encouraging clients to make choices in the areas of recreation and leisure activities and planning activities; 3) developing individual support circles for clients by encouraging the development of friendships; 4) identifying, assessing and reporting any seizures, injuries, illnesses, behavioral episodes and/or any other medical or emotional difficulty a client may experience to Coordinators or assistant Coordinators; 5) maintaining programmatic supports for at least one client, participating in Interdisciplinary Team Meetings, and preparing all material relating to the client for presentation to client and other team members; 6) implementing individual support plans and completing daily records; 7) administering medications; 8) planning, purchasing and preparing meals; 9) cleaning and maintaining the client's home and properties; 10) assisting clients with basic financial transactions; and 11) assisting with personal hygiene needs such as tooth brushing, flossing, showering, toileting and menstruation care.

In order to cover absences by RSAs caused by vacation schedules, long-term medical leave, staffing shortages, call-outs, or any other reason, the Employer relies on a complement of RSA floaters and substitute RSAs. In this regard, RSA floaters are guaranteed at least a full or part-time schedule, depending upon the number of hours they were hired for, and cannot decline assignments. The disputed substitute RSAs indicate the days and hours they can work, are not guaranteed any hours, and can freely decline assignments. Coordinators for each residential program first schedule RSA floaters for absences known in advance, such as vacation schedules, and then, to the extent that vacancies remain, contact substitute RSAs on an as needed basis from a master substitute list maintained by the Employer. Coordinators typically re-employ substitute RSAs if their work is satisfactory and they are available. Conversely, the

Employer may remove the names of, or at least discontinue contacting, those substitute RSAs on its master substitute list who reject an undisclosed number of assignments. At the time of the hearing in this matter, the master substitute list contained the names of 34 substitute RSAs, 20 of whom are in dispute.³ It is common for regularly employed RSAs to change their status to substitute RSAs, and vice-versa. In this regard, approximately 12 of the 20 disputed substitute RSAs were formerly employed as regular RSAs.

Substitute RSAs generally perform the same duties, except as described below, under the same supervision as regular RSAs and work alongside other RSAs in a team setting. They generally do not possess the same level of knowledge about clients as RSAs who are regularly assigned to that program or facility. As a result, substitute RSAs do not participate in the generation of a client's annual support plan or the quarterly review of that plan. Rather, similar to newly-hired regularly employed RSAs, substitute RSAs must review all information maintained in a client's master file each time they are assigned to a home in order to acquaint themselves with the physical and medical needs of, and any status changes relating to, clients within that program. Although all RSAs, including substitutes, are required to complete documentation regarding the client's daily activities and status changes, substitute RSAs are not expected to maintain the same level of detailed documentation as a regularly employed RSA. Unlike regularly employed RSAs, substitute RSAs do not generally accompany clients to doctor appointments, pass medications, or perform certain limited medical procedures under the delegation of a licensed nurse. Although not entirely clear, it appears that an undisclosed number of substitute RSAs perform some or all of these duties either because they are familiar with the client, are certified to pass medications, and/or are trained to perform nurse delegated tasks. Finally, newly hired regularly employed RSAs, but not substitute RSAs, are required to review and initial a checklist

³ The master substitute list in the Residential program contains the names of 12 employees who are regularly employed in the vocational program in classifications included in the petitioned-for unit and who, on a limited basis, also work as RSA substitutes. The parties have stipulated to the inclusion of these 12 employees into the unit.

The same master list also includes the names of two regular employees, Cathleen Barbosa, an administrative assistant in the residential program, and Claire Dickinson, a Coordinator in the vocational program, who are not regularly employed in positions in the petitioned-for unit. Neither the Union nor the Employer seeks the inclusion of these two individuals in the petitioned-for unit.

on clients within their particular group home or program in order to become acquainted with clients' specific needs and other issues associated with that location, including safety protocols.

With regard to qualifications, all RSAs, including substitute RSAs, must possess a high school diploma or its equivalent, must be able to lift 50 pounds, and are required to have a valid driver's license. In addition, regularly scheduled RSAs are required to attend 21 hours of training in a class provided by the State of Connecticut's Department of Mental Retardation in order to become "med-certified." This allows RSAs to dispense medication to clients.⁴ As noted above, substitute RSAs are not required to become med-certified. However, an undisclosed number of substitute RSAs are med-certified and, therefore, are capable of dispensing medications.

Regularly employed RSAs are hired at \$11.00 per hour and receive a 75 cent per hour shift differential. The current roster of regularly employed RSAs earn a mean average of about \$12.33 per hour, and the most highly paid regular RSA earns about \$14.93 per hour. Substitute RSAs are generally hired at \$9.00 per hour and do not receive any form of shift differential. They may receive a higher starting hourly rate depending upon their experience level or whether they have transferred from an existing regular position.

B. The Vocational Program

At its main Hartford facility, the Employer operates the following four vocational programs, also referred to as the "day" programs: 1) the "Life Enrichment Program" (LEP), which provides a variety of activities to approximately 48 elderly clients; 2) three separate "Employment Centers," which assist between 115 and 150 clients develop pre-vocational and vocational skills and complete subcontracted assignments; 3) the "Supported Employment" program, which refers about 135 clients for employment to, and provides on-site coaching at, one of about 24 area employers, such as law firms and hotels; and 4) a "modules" program, which provides between 35 and 80 clients with physical and/or chronic medical problems with various activities, such as physical therapy, music, and arts and crafts.

⁴ However, employee Daphne McDonald, a long-term regularly employed full-time RSA is not med-certified.

The vocational program employs approximately 110 job coaches, including floater job coaches, who are assigned to one of the four vocational programs described above and report to the Coordinator and/or Assistant Coordinator responsible for that program. Job coaches generally work from 8 a.m. to about 3:00 p.m. Monday through Friday. They work with either individual clients or groups of clients, develop and review their clients' vocational plans, and teach clients how to follow such plans.

Similar to the residential program, the Employer maintains a complement of job coach floaters and substitute job coaches to cover short and long-term absences by regular job coaches. Job coach floaters and substitute job coaches perform the same duties, with certain limited exceptions described below, under the same supervision as regular job coaches and work alongside other job coaches in a team setting. With regard to the limited differences in duties, substitute job coaches are generally assigned to work with a smaller number of clients than regular job coaches. Also, although not entirely clear, it appears that substitute job coaches do not either generally prepare the same daily client reports prepared by regular job coaches or do not provide the same level of detail in those reports.

Each Friday, substitute job coaches are expected to confirm their availability to work the following week because of the numerous vacancies that exist in that program. In all other respects, the Employer maintains the same policies and procedures in assigning job coach floaters and substitute job coaches as it does for RSA floaters and substitute RSAs, as described above. In this regard, the Employer maintains a separate master job coach substitute list on which substitute job coaches indicate their available days and hours.

At the time of the hearing in this matter, the master substitute list contained the names of eight job coach substitutes whose voting eligibility is in dispute. Similar to the residential program, it is common for regularly employed job coaches to change their status to substitute job coaches, and vice versa. In this regard, at least two of the eight current job coach substitutes were former regularly employed job coaches.

All job coaches must possess a high school diploma or its equivalent, be able to lift 50 pounds, and have a valid driver's license. Regularly employed job coaches, but

not substitute job coaches, are required to become med-certified.⁵ However, most, if not all, of the job coaches assigned to LEP do not have any responsibility for dispensing medications to clients participating in that program. Job coaches are also expected to obtain a public service license, also known as a PPEC license, in order to drive the Employer's vehicles that carry 10 or more passengers.⁶

Regularly employed job coaches are hired at \$11.00 per hour. The current roster of regularly employed job coaches earn a mean average of about \$11.63 per hour, and the most highly paid regular job coach earns \$15.19 per hour. Substitute job coaches are usually hired at \$9.00 per hour, but they may receive a higher starting hourly rate up to \$11.00 per hour depending upon their experience level or whether they have transferred from an existing regular position.

C. Other Terms and Conditions of Employment

In order to obtain employment, all new hires, including substitutes, must pass background checks confirming that they possess a clean driving record and do not have a criminal record. Thereafter, the Employer maintains a six-month "Introductory Period" for all employees, including substitute employees, during which employees are evaluated based on their performance, skills, qualifications, professional attitude, work habits, and attendance. Regularly employed RSAs, job coaches, and substitute job coaches in the modules program receive an annual written performance evaluation. All remaining substitute employees receive a verbal evaluation on an annual basis.

All newly-hired employees, including substitute employees, participate in an orientation process spanning several weeks during which they jointly receive training on OSHA blood borne pathogens, CPR, first aid, "emergency behavioral techniques," Physical Management Techniques (PMT) and the Employer's "abuse and neglect" policy. All newly-hired RSAs, including substitute RSAs, are also trained on "residence emergency evacuation" procedures, "emergency notification" procedures, and on client routines and personal overviews, which includes health, programmatic, and behavioral needs. All newly-hired job coaches, including substitute job coaches, receive specific

⁵ At least two regularly employed full-time job coaches, Maritza Gonzalez and Janet Caraballo, are not med-certified.

⁶ Alice Lebron, a regularly employed full-time job coach, does not have a driver's license or a PPEC.

training on the vocational program to which they will be assigned. All RSAs, including substitute RSAs, are required to maintain a current CPR certification and must be able to verify such certification on a yearly basis.

In the months following their hire, the Employer requires regularly employed RSAs and job coaches, but not substitute employees, to receive additional in-service training on the following issues: 1) defensive driving⁷; 2) “sexuality” guidelines; 3) “active treatments,” relating to teaching techniques and a client’s ability to learn; 4) “planning and provision,” relating to the proper documentation of a logbook; and 5) “habilitative behavioral” techniques. In addition, the Employer holds mandatory training classes on the third Thursday of each month for vocational employees, which are attended by substitute job coaches who are working on that day. According to the Employer’s training requirements, it is the Employer’s “intention to have substitute/relief staff work with regular staff who have received all the required trainings, whenever possible.”

RSAs and job coaches receive a varying range of fringe benefits depending upon which of the following four categories they are employed in: 1) full-time employees who regularly work 30 hours or more per week; 2) Part-Time (I) employees who regularly work between 20 and 30 hours per week; 3) Part-Time (II) employees who regularly work fewer than 20 hours per week; and 4) substitute employees who, as described above, are hired on an as needed basis. Only full-time employees are eligible to participate in the Employer’s health insurance, dental insurance, life insurance, long-term disability, and tuition reimbursement programs. Only full-time and Part-Time I employees are eligible for holiday pay and paid time off (PTO) benefits (both of which are pro-rated for Part-Time (I) employees), and short-term disability. All employees, including substitutes, who work at least 1,000 hours annually are eligible to participate in the Employer’s 401(k) plan; receive reimbursement for field work expenses; and direct deposit of payroll checks.

Substitute RSAs and job coaches are encouraged to apply for regular staff positions and, depending upon their performance, are usually accorded a higher preference in the hiring process than other applicants. In this regard, according to Vice

⁷ Although substitute employees are not required to undertake such training, the record reveals that an unspecified number of such employees have received defensive driving training.

President Ingersall, the substitute position can be used as a “stepping stone” to regular employment.

II. ANALYSIS AND CONCLUSION

The Board has long recognized that there is no statutory requirement that a unit for collective bargaining be the most appropriate unit. Rather, the Act only requires that the unit sought be “an” appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Therefore, a petitioner is not required to seek the “most” appropriate unit of employees, unless an otherwise appropriate unit does not exist. *P. Ballantine & Sons*, 141 NLRB 1103, 1107 (1963). The essential inquiry is whether a particular grouping of employees shares a community of duties and interests sufficiently distinct from other employees so as to warrant their establishment as a separate unit. In determining the appropriate unit, the following community of interest criteria are considered: degree of functional integration, common supervision, employee skills, interchangeability, contact among employees, similarities in wages, hours, benefits and other terms and conditions of employment, and bargaining history. *Kalamazoo Paper Box Co.*, 136 NLRB 134 (1962); *Franklin Mint Corp.*, 254 NLRB 714 (1981). Moreover, the Petitioner’s desire as to the unit composition is a relevant, but not dispositive, factor. *Airco, Inc.*, 273 NLRB 348 (1984).

Based upon the above and the record as a whole, I find that substitute RSAs and substitute job coaches share a sufficient community of interest with the petitioned-for employees to warrant their inclusion in the petitioned-for unit. In this regard, substitute RSAs and substitute job coaches share common supervision with employees in the petitioned-for unit, have regular work-related contacts with such employees, perform generally the same duties as full and part-time RSAs and job coaches, work under similar terms and conditions of employment, and have similar experience and educational requirements. Further, I note that the Employer encourages substitute employees to apply for full and part-time positions as they become available, and the regular interchange and transfer of employees from full and part-time RSA and job coach positions to substitute RSA and job coach positions, and vice versa. See *Brattleboro Retreat*, 310 NLRB 615, 627 (1993).

Having determined that substitute RSAs and substitute job coaches share a sufficient community of interest with employees in the petitioned-for unit, there remains for consideration the question of whether any substitute employees have worked with sufficient regularity to be eligible to vote in the election directed herein.⁸ In this regard, it is well established that in determining such employees' eligibility to vote, the Board frequently does so pursuant to a formula which the Board devises after "a careful balancing of the factors of length, regularity, and currency of the disputed employees employment." *Capitol Insulation Company, Inc.*, 233 NLRB 902, 903 (1977); *Scoa, Inc.*, 140 NLRB 1379, 1381 (1963). Thus, the Board will select a formula which attempts to balance these factors in an equitable manner, with the eligibility of non-scheduled part-time employees normally determined "on the basis of a representative period, usually a quarter, which immediately precedes the eligibility date." *Hardy Herpolisheimer's – A Division of Allied Stores of Michigan, Inc.*, 227 NLRB 652 (1976). More specifically, in cases such as the one at bar, the Board has consistently found non-scheduled on-call employees to be eligible if they regularly average four hours or more per week for the last quarter prior to the eligibility date. See e.g., *Sisters of Mercy Health Corporation*, 298 NLRB 483 (1990); *Hardy Herpolisheimer's – A Division of Allied Stores of Michigan, Inc.*, *supra*; *Mademoiselle Shoppe, Inc.*, 199 NLRB 983, 984 (1972); *Sears, Roebuck and Co.*, 193 NLRB 330 (1972); and *Davidson-Paxon Company*, 185 NLRB 21, 24 and cases cited therein at footnote 7 (1970). I shall apply that formula here.⁹

Based thereon and the record as a whole, I find eligible to vote in the election directed herein those substitute RSAs and substitute job coaches who have not been terminated for cause or voluntarily quit and who have averaged 4 hours or more per week during the quarter immediately preceding the date of this Decision and Direction of Election .

⁸ Of the 28 substitute employees at issue, the record establishes that during the twelve week period ending November 19, 2005 that preceded the November 30 opening of the hearing, nine did not work at all, five worked an average of less than four hours per week, and the remainder worked an average of four or more hours per week.

⁹ Although the Employer has declined to concede the applicability of this formula, it has proffered no other formula.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time resident support assistants, resident support assistant floaters, substitute resident support assistants, job coaches, job coach floaters, substitute job coaches, drivers and personal care assistants employed by the Employer at its Greater Hartford, Connecticut facilities; but excluding all business office employees, managers, recreation assistants, coordinators, assistant coordinators, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

Eligible to vote: those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

Ineligible to vote: employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the strike's commencement and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by New England Health Care Employees Union, District 1199, SEIU.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should

have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before December 28, 2005. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, or electronically pursuant to the guidance that can be found under "E-gov" on the Board's web site at www.nlr.gov. This request must be received by the Board in Washington by January 4 , 2006.

Dated at Hartford, Connecticut this 21st day of December, 2005.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34